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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1960

No. 532

EDDIE R. DICKSON, Warden, California State Prison at San Quentin, California,

Petitioner,

vs.

MANUEL JOE CHAVEZ,

Respondent.

EDDIE R. DICKSON, Warden, California State Prison at San Quentin, California,

Petitioner,

vs.

CLYDE BATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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In the Supreme Court
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OCTOBER TERM, 1960

No.

FRED R. DICKSON, Warden, California State Prison at San Quentin, California,
Petitioner,
vs.
MANUEL JOE CHAVEZ,
Respondent.

FRED R. DICKSON, Warden, California State Prison at San Quentin, California,
Petitioner,
vs.
CLYDE BATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Fred R. Dickson, Warden of the California State Prison at San Quentin, prays that a writ of certiorari

issue to review the judgments of the United States Court of Appeals for the Ninth Circuit in the above entitled actions of June 16, 1960, which reversed the orders of the United States District Court.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix A, is reported at 280 F.2d 727 (1960).

The opinion of the California Supreme Court, which affirmed the judgment under attack in these proceedings is reported at 50 Cal.2d 778.

JURISDICTION.

The orders of the United States District Court denying the petition for writ of habeas corpus was entered on August 7, 1959; Appendix D.

The judgments of the Court of Appeals for the Ninth Circuit reversing the District Court's order was entered on June 16, 1960; Appendix B. After due consideration, the U. S. Court of Appeals denied a rehearing on August 17, 1960; Appendix C. A stay of mandate has been granted pending determination of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Pursuant to rule 23(5) a single petition for writ of certiorari is being filed to cover both cases.

QUESTIONS PRESENTED.

1. May the District Court, in the absence of a "vital flaw" in the state proceedings, be compelled to redetermine a factual question previously determined by the trial court?

2. What discretion, if any, does the District Court have in refusing to take evidence to redetermine a fact previously determined by the State Court?

3. Would the District Court have jurisdiction to hold a hearing and issue the writ of habeas corpus?

a. Did the failure of the petitioners to present available evidence of the alleged discrepancies in the transcriptions to the trial court preclude them from raising the question on federal habeas corpus?

b. Does this failure result in a waiver of the question? Does this result in petitioners having failed to exhaust their state remedies within the meaning of 28 U.S.C. 2254?

4. Is "prejudicial error" the equivalent of "denial of due process"?

STATUTES INVOLVED.

28 U.S.C. 2241 and 28 U.S.C. 2254; Appendix E.

STATEMENT.

Petitioners Bates and Chavez, along with one Manuel Hernandez, were jointly tried, charged and convicted of six counts of murder in the first degree

and punishment for Bates and Chavez was fixed at death. Hernandez was sentenced to life imprisonment. Likewise, the three defendants were charged, tried and convicted of arson, a violation of § 448a of the California Penal Code. In brief, the defendants were accused of having participated in an argument and fight in the Mecca Bar and threatened to get even. They left the bar, obtained gasoline, threw the gasoline through the front door of the bar and ignited it. As a result, five persons were killed by carbon monoxide and the sixth death was caused by asphyxiation and burns.

The appeals of Bates and Chavez were automatically before the California Supreme Court under California practice. A separate notice of appeal was filed by Hernandez and the California Supreme Court disposed of all three cases in *People v. Chavez*, 50 Cal.2d 778. The United States Supreme Court denied the petition for writ of certiorari. *Chavez v. California*, 358 U.S. 946; *Bates v. California*, 359 U.S. 993.

On August 3, 1959, respondent filed a petition for writ of habeas corpus in the U.S. District Court; the District Court issued an order to show cause on August 5, 1959, returnable August 7, 1959. Petitioner filed a return to the order to show cause, together with points and authorities, on August 7, 1959. At the time of the hearing on the order to show cause petitioner pursuant to the case of *Brown v. Allen*, 344 U.S. 443, lodged with the District Court a copy of the Clerk's Transcript and Reporter's Transcript of the murder trial of Bates and Chavez.

On August 7, 1959, the U. S. District Court entered an order denying the petition for writ of habeas corpus. On that same date a notice of appeal was filed and the District Court issued a certificate of probable cause.

On June 16, 1960, the U. S. Court of Appeals reversed the order of the District Court and on August 17, 1960, the Court of Appeals denied a petition for rehearing.

The opinion of the Court of Appeals ordered the District Court to hold a further hearing and "at such further hearing the tape recordings should be called for and listened to, and the trial court proceedings relative to the use of the transcribed statements should also be examined."

The Court further ordered the examination of photographs admitted in the State trial court. The language of the opinion in this regard was as follows: "Since this cause is to be remanded for further proceedings in connection with the asserted inaccuracy of the transcribed statements, we think the district court should at the same time examine the photographs taken away from the premises as an aid in redetermining whether their introduction has deprived appellants of due process."

ARGUMENT.

I.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals for the Ninth Circuit is in conflict with other decisions of the Court of Appeals for the Ninth Circuit and in conflict with decisions of this Court.

The present decision is in conflict with the decision in *Linden v. Dickson*, 278 F.2d 755 (1960) and the decision in the Ninth Circuit in the case of *Muhlenbroich v. Heinze*, 281 F.2d 881 (1960). The present decision is not in accord with the decision in *Brown v. Allen*, 344 U.S. 443.

The opinion of the Court of Appeals for the Ninth Circuit is in conflict with the long standing views of this Court as expressed in *Brown v. Allen*, 344 U.S. 443 on the question of "waiver" and "exhaustion of state remedies." The Court of Appeals requires the District Court to second guess the trial court as to the accuracy of said transcriptions and requires this second guess to be made on evidence which was not produced in the trial court. According to the allegations of the petition, petitioners were presumably aware of said evidence at the time of the trial and their failure to present such evidence at that time to offset the testimony of the prosecution resulted in a waiver of any objection, unless the decision in *Brown v. Allen*, supra, at 486, 503 is modified.

The opinion of the Court of Appeals for the Ninth Circuit equates "prejudicial error" with "denial of

due process." The opinion of the Court of Appeals has merged the concept of the denial of due process and the concept of prejudicial or reversible error. The opinion of the Court of Appeals has either knowingly or inadvertently equated these concepts. The opinion of the Court of Appeals, after setting forth the standards, has stated "if the transcriptions were grossly inaccurate to the *substantial prejudice* of the appellants there would . . . in our opinion be a denial . . . of due process."

The Court of Appeals likewise stated that a material variance between the intelligible portions of the records and the transcribed statements which *substantially prejudiced* the appellants would require federal relief.

This equation of due process and prejudicial error is contrary to and in conflict with the numerous prior decisions of this Court.

II.

IMPORTANCE OF THE QUESTIONS.

The questions here presented are of importance in the administration of federal habeas corpus statutes. Since the opinion in *Brown v. Allen*, in 1952, this Court has not rendered a full opinion on the question of the powers, duties and discretion of the District Court in reference to the taking of evidence on a factual question which is the basis of a federal question. The recent decisions of this Court have been

per curiam decisions and have been no real guidance to the District Courts or to counsel in disposing of the some 800 petitions for writs of habeas corpus filed in the District Courts each year. There are no standards provided for the District Court in the determination of these questions in death penalty cases which are as frequently as not presented on the eve of a scheduled execution. The conflict between the decisions in the Court of Appeals for the Ninth Circuit itself leaves the various District Courts of the Circuit in confusion. This problem should be authoritatively determined by this Court and not left in conflict and doubt.

Likewise, the questions concerning waiver and exhaustion of state remedies are questions which occur in nearly every petition for writ of habeas corpus presented to the District Court and are questions upon which this Court should rule definitively.

The importance of the question of the standard to be used in determining "due process" would seem to need little comment.

III.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

A. The Decision of the Court of Appeals for the Ninth Circuit Is in Conflict With Other Decisions of the Court of Appeals for the Ninth Circuit and in Conflict With Decisions of this Court.

The present opinion of the Court of Appeals for the Ninth Circuit requires the District Court to examine the transcript of the state court proceedings in order

to determine whether or not the alleged discrepancy between the recording and the transcription of the statements introduced resulted in substantial prejudice to petitioners.

The present decision is in conflict with the decision in *Linden v. Dickson*, 278 F.2d 755 and the decision in the Ninth Circuit in the case of *Muhlenbroich v. Heinze*, 281 F.2d 881 (1960). The present decision is not in accord with the decision in *Brown v. Allen*, 344 U.S. 443. The *Linden* case authorizes the District Court to rely upon the decision of the highest state court as a part of the state record. That ruling should apply with equal force in the present case.

The *Linden* case involved an allegation that defendant had become insane at the time of the trial and that while so mentally incapacitated he had discharged his attorney and attempted to defend himself. This matter was discussed in the decision of the California Supreme Court. The prisoner in that case thus simply took issue with the conclusion of the trial court and the California Supreme Court as to the interpretation of his conduct. In the present case the prisoner contended that there was a discrepancy between the statements of Hernandez and Brenhaug as recorded and the statements as transcribed and introduced in evidence. The prisoners also contend that gruesome photographs were introduced which resulted in violation of due process.

The decision of the Court of Appeals for the Ninth Circuit requires the District Court to review those photographs and to take evidence as to alleged dis-

crepancy between the statements as recorded and as transcribed. It is clear that the District Court will be making a judgment as to the inflammatory nature of the photographs and as to the prejudicial effect of this on the trial, in the same fashion as this was done by the trial court and the California Supreme Court. There is no greater discrepancy between the matters set out in the opinion of the California Supreme Court and the allegations of petitioners than existed in the *Linden* case; both involve the drawing of legal conclusions from the "record."

Likewise, the alleged discrepancy between the statements as transcribed and as recorded does not present a question the resolution of which requires a different judicial technique than that presented by the allegations in the *Linden* case. Both situations involve an evaluation and ruling by the trial court based on the facts before it; in one instance an evaluation as to the defendant's sanity and in the other instance a determination of a "preliminary question of fact" prior to ruling on evidence. Indeed, it is apparent from the briefs, of which the Court of Appeals took judicial notice, that the *only* evidence presented before the trial judge concerning the accuracy of the transcriptions was that the transcriptions were true and correct copies of the recordings. See RT 1411-1412, 1427, 1431-1432, 1464-1466, 1470; Opening Br. of Chavez, pp. 27, 28; Opening Br. of Bates, pp. 16, 20-21; Resp. Br. pp. 64, 65, 67.

Furthermore, the opinion of the Court of Appeals totally ignores the argument set out at length by the

California Supreme Court concerning the possible effect of these statements on either Bates or Chavez. It should be noted that neither of these statements were admitted as to Chavez. The California Supreme Court properly assumed that the jury followed the instructions and did not consider these statements as against Chavez. Even assuming that the statements as introduced were seriously and "prejudicially" different than the statements as recorded, this fact would appear to be immaterial to Chavez' position. It would appear that no prejudice resulted to him in view of the instruction to the jury not to consider the statements. Put another way, if one assumes (as an appellate court must under the long-established rule of common law jurisdiction) that the jury followed the instruction and disregarded the statements as to Chavez, any error in the transcription would not result in prejudice.

Likewise, the statement of Hernandez was not admitted as to the defendant Bates. Such statement was introduced with instructions that the jury disregard it as to Bates. The California Supreme Court nevertheless assumed that the jury followed the instructions as to Bates. Thus, it is apparent that any discrepancy in these statements would be immaterial and would present no federal question. The statement of Brenhaug was admitted as to Bates. Such statement was introduced under proper instructions to the jury. The opinion of the Court of Appeals recognizes the fact that the only evidence was the police officer's testimony. The officer testified that the transcriptions were

true and correct. This fact was, and is, not contradicted by petitioners. Thus, the petition as filed below fails to state a federal question. It is clear that the District Court could properly look at the documents before the Court, together with the opinion of the California Supreme Court, and arrive at the same conclusion as the California Supreme Court.

The District Court could conclude that the jury followed the instructions and that the trial court correctly overruled the objection concerning the alleged inaccuracy in the transcriptions of the recorded statements, since the only evidence before the trial court was that the transcribed statements were true and accurate transcriptions. See RT 1411-1412, 1431-1432, 1464-1466.

We thus request this Court to grant a writ of certiorari because of the conflict that exists between this opinion and the opinion in *Linden v. Dickson*, which decision was neither discussed, distinguished or even cited in the present decision.

B. This Court Erroneously Required a Redetermination of a Factual Question Previously Determined by the State Trial Court as a "Preliminary Question of Fact".

The opinion of the Court of Appeals requires the District Court to redetermine a question of fact which has previously been determined by the state trial court. Whether or not the transcription of the statement as introduced was a substantially true and correct transcription of the record is a preliminary question of fact to be determined by the trial court prior to the introduction of such evidence. In the present case,

the trial court received evidence that the statements were substantially true and correct copies of the recordings. See RT 1411-1412, 1431-1432, 1464-1466. This was the only testimony received by the trial court. Defendants did not offer any counter-evidence. The prisoners' attorneys made general objections to the foundation and objected that the statements were not true and correct copies, but they made no specifications of the alleged discrepancies and offered no evidence to support the statements. They have not yet done so. In view of the evidence before the trial court at the time of its ruling on this preliminary question of fact, the ruling of the trial court was eminently proper.

The Court of Appeals now requires the District Court to second guess the trial court as to the accuracy of said transcriptions. It requires that this second guess be made on evidence which was not produced in the trial court. Indeed, by failure to present such evidence to the trial court to offset the testimony of Officer Tidyman the defendants have *waived any objection*. This is patent from a reading of the briefs, of which the Court of Appeals has taken judicial notice. See Resp. Br. pp. 64, 65, 67. See *Brown v. Allen*, 344 U.S. 443, 486, 503.

C. The Opinion of the Court of Appeals Makes the Presence of a "Prejudicial Error" the Equivalent of a "Denial of Due Process"; If the Test Applied in This Case Is Followed, the State Appellate Procedures Would Best Be By-Passed and State Convictions Reviewed by the District Courts.

The opinion of the Court of Appeals has in effect merged the concept of the denial of due process and the

concept of prejudicial or reversible error. Petitioner does not argue with the wording of the standard of due process set out in the opinion of the Court of Appeals insofar as it quotes and utilizes language of the U. S. Supreme Court to the effect that denial of due process exists where there has been a denial of "fundamental fairness essential to the concept of justice." However, the opinion of this Court has either knowingly or inadvertently equated the concepts of due process and the concept of reversible or prejudicial error. The opinion of the Court of Appeals, after setting forth the standards, has stated that "if the transcriptions were grossly inaccurate to the *substantial prejudice* of the appellants there would . . . in our opinion be a denial . . . of due process."

The Court of Appeals likewise stated that a material variance between the intelligible portions of the records and the transcribed statements which *substantially prejudiced* the appellants would require federal relief. It is clear from this language, irrespective of other language in the opinion, that the Court of Appeals is substituting the standard of "reversible error" for the standard of due process. Indeed, the wording of the opinion is in the classical language of the reversible error rule currently followed by all common law jurisdictions, including California. The California Constitution contains a provision which is a typical statement of the reversible error rule. It requires that "no judgment shall be set aside for the improper admission or rejection of evidence . . . unless after an examination of the entire cause, it

cluding the evidence, the Court shall be of the opinion that the error complained of has resulted in a miscarriage of justice" (Art. IV, § 4½, Calif. Constitution).

If the District Court is permitted to set aside judgments where evidence has been introduced to the "substantial prejudice" of the appellants, then every ruling on procedure, every question concerning the conduct of the trial by the judge or the prosecution, is a question which can be reviewed by the District Court. If the test is whether or not "substantial prejudice" resulted to the defendants, then these matters may be reviewed by the District Court, irrespective of whether or not the highest state court has determined on appeal that the ruling was not prejudicial. Indeed, the opinion of the Court of Appeals permits the District Court to second guess the highest state court on the question of prejudice. Under the test as set out in this case, it would seem most expeditious and most sensible to by-pass the state appellate courts and to permit direct review by the United States District Court of all rulings on evidence, procedure and the conduct of the trial.

It should further be pointed out that the opinion of the Court of Appeals suggests that the District Court may examine the photographs and determine the prejudicial effect without examining the entire transcript. The Court of Appeals suggests that the District Court may find it advisable to consult any *specific part* of the trial proceedings as having a bearing on the question of prejudice in the introduction of

said photographs. The California Constitution requires that a state appellate court decide a question of prejudice only after "an examination of the *entire cause*, including the evidence." We believe that this Court has merged the doctrines of prejudicial error and the concept of due process and indeed, would permit an evaluation of prejudice in such a fashion as to deny both sides due process. It would permit the District Court to decide the question of prejudice without examining the entire cause, including the evidence. This would be "grossly unfair" in a constitutional sense. Both parties are entitled to an evaluation of the prejudicial effect of anything occurring at the trial to be judged in the context of the entire cause, including the evidence.

CONCLUSION.

It is respectfully requested that this petition be granted.

Dated, San Francisco, California,
November 9, 1960.

Respectfully submitted,

STANLEY MOSK,
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ARLO E. SMITH,
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(Appendices A, B, C, D and E Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Manuel Joe Chavez, *Appellant*, vs. Fred R. Dickson, Warden, California State Prison at San Quentin, California, *Appellee*.	No. 16,590
Clyde Bates, *Appellant*, vs. Fred R. Dickson, Warden, California State Prison at San Quentin, California, *Appellee*.	No. 16,622

June 16, 1960

Appeal from the United States District Court for the Northern District of California Southern Division

Before: Magruder, Hamley and Koelsch, Circuit Judges

HAMLEY, Circuit Judge:

Manuel Joe Chavez and Clyde Bates, state prisoners under sentence of death, appeal from district court orders denying their applications for habeas corpus.

Separate orders of denial were entered and separate appeals have been taken. The district court however, considered the applications together, and we will do likewise on these appeals.[1]

Appellants were jointly tried in the Superior Court of Los Angeles County on six counts charging felony-murder in violation of California Penal Code, § 189, and one count charging wilful and malicious burning of a building not a parcel of a dwelling, contrary to California Penal Code, § 448a. Each was convicted on all counts, the convictions for violation of section 189 being designated by the jury as first degree murder. The convictions were thereafter affirmed by the California Supreme Court. People v. Chavez, 50 C.2d 778, 329 P.2d 907; cert. den., Chavez v. California, 358 U. S. 946.

The charges and convictions grew out of an occurrence on April 4, 1957, when gasoline and lighted matches were thrown on the floor of the Mecca bar in Los Angeles. Six persons died in the resulting explosion and fire. The death sentences were imposed as a result of the convictions of first degree murder. One Manuel Hernandez was tried at the same time and convicted on similar counts. His sentence, however, was fixed at life imprisonment.

On these appeals it is contended that the district court erred in holding that each of the asserted grounds for relief set out in the respective applications of writs of

[1] In this court appellants filed separate opening briefs but joined in a reply brief. Appellee filed one brief dealing with both appeals.

habeas corpus is without merit. It is also argued with respect to each such ground, except the first, that the district court erred in refusing to examine the state court record before ruling on the applications.

In this opinion we will discuss, seriatim, the grounds for relief advanced in the applications. As to each such ground we will first consider whether the district court should have examined the record before ruling on such asserted ground. If it is concluded that such an examination was not required, we will then consider whether the trial court erred in holding such asserted ground for relief to be without merit.

The first asserted ground for relief set out in the applications is that California's construction of the Penal Code sections under which appellants were convicted had the effect in this case of depriving them of certain federally protected rights.

Appellants were indicted and convicted for violations of California Penal Code, §§ 189 and 448a, in that each of them was responsible for setting fire to a bar in Los Angeles, as a result of which six persons perished. Section 189 defines as murder in the first degree all murder which is perpetrated by means of certain specified acts, including "arson." Section 448a makes it a crime for a person to wilfully and maliciously burn any building not a parcel of a dwelling. The word "arson" does not appear in this section. In section 447a, however, it is provided that any person who wilfully and maliciously sets fire to "any dwelling house, or any kitchen, shop, barn, stable, or other out-

house that is parcel thereof, or belonging to or adjoining thereto . . . shall be guilty of arson."

In their appeals to the California Supreme Court appellants contended that only the offense proscribed by section 447a constitutes arson. Hence, it was argued, section 448a set forth a different offense which is not arson, and accordingly a violation of the latter section would not be an act of "arson" within the meaning of section 189 defining murder in the first degree. It was further pointed out that appellants could not have been found guilty of arson as defined in section 447a, since the Mecca bar was not a "dwelling" or any "outhouse that is a parcel thereof, or belonging to or adjoining thereto."

The California Supreme Court rejected this argument, holding that a violation of section 448a would be "arson" within the meaning of section 189 defining murder in the first degree. People v. Chavez, supra, pages 787-788. It is this construction of sections 189 and 448a which, according to appellants, has deprived them of certain federally protected rights.

As before noted appellants do not here contend that the district court was required to examine the record of the state court proceeding before passing upon this first ground for relief asserted in the applications.[2] We therefore turn at once to a consideration of the argument that California's interpretation of sections 189 and 448a in this case has deprived appellants of certain constitutional rights.

[2] An examination of the record of the oral argument before the district court indicates that no such request was made.

First it is argued the construction which the California Supreme Court has placed upon these sections is "arbitrary and unreasonable." The contention here is that the meaning which that court has attached to the word "arson" as used in section 189 finds no support in either the common law or in the statutory law of California. Appellants disavow any contention that for this asserted reason we ought to reconstrue section 189 to mean something different than the California court says that it means.[3] They nevertheless urge that the California construction of the statute is so unfounded that the result has been to deprive them of due process of law.

It is difficult to perceive how this court can consider whether the state construction of the statute is arbitrary and unreasonable without in effect reviewing the correctness of the state court's interpretation of section 189. This as noted in footnote 3 is not our function.

In any event the decision in People v. Chavez, supra, was reached with due regard to relevant considerations and materials. That court, speaking unanimously, based its interpretation of the statute upon its understanding of the legislative intent. The legislative intent was determined by analyzing the history of state legislation in this field and considering the interplay of other existing statutes. The court also cited its 1947

[3]Federal courts are bound by the interpretation placed upon the statute of a state by its highest court. Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U. S. 270, 273; Daloia v. Rhay, 9 Cir., 252 F.2d 768, 771; Duffy v. Wells, 9 Cir., 201 F.2d 503, 505.

opinion in Ex parte Bramble, 31 C.2d 43, 187 P.2d 411, and quoted supporting language from the latter opinion. This is enough to convince us that whether right or wrong the interpretation placed upon section 189 in People v. Chavez, supra, was not arbitrary and unreasonable in any sense that could possibly have constitutional significance.

Under their second and third arguments based on the statutory question it is contended that the construction placed on section 189 whereby the term "arson" as therein used was held to embrace the crime defined in section 448a was announced for the first time in the decision handed down in People v. Chavez, supra, after appellants had been convicted. Thus, it is asserted, appellants did not at the time of the incident at the Mecca bar have notice that section 189 would be so construed. The result is, appellants argue, that California has increased the penalty to which appellants were actually subject when the alleged crimes were committed.

These arguments are necessarily predicated on the assumption that section 189 meant one thing from the date of its enactment to the date of the decision in People v. Chavez, supra, and something else thereafter. But to accept this view is to reject the interpretation which the California Supreme Court has placed upon the statute. That court undertook to construe the statute as of the date of enactment. We are bound to accept that construction as of that date. Hence, we are not free to hold that section 189 when enacted meant something different than the California court

found it to mean in People v. Chavez. It follows that no *ex post facto* question could possibly arise.[4]

Appellant's fourth argument on this branch of the case is that California's construction of sections 189 and 448a resulted in appellants' conviction upon a charge not made against them. The point sought to be made is that appellants were really convicted of violations of section 447a, since this is the only statute relating to the setting of fires which uses the word "arson."

Appellants were not charged with or convicted of violations of section 447a, but rather of section 448a. Appellants' contention to the contrary is not based on the wording of the indictment or upon the nature of the evidence.[5] The basis of the contention is that only a violation of section 447a could be "arson" as defined in section 189. The California Supreme Court has held to the contrary, and we are bound by that construction.

This brings us to the fifth and final argument advanced by appellants with regard to the question of statutory construction. It is contended that the con-

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[4]As before noted, the California Supreme Court as early as 1947 had construed the word "arson" as used in § 189 as including the crime defined in § 448a. Ex parte Bramble, supra. It is true that Bramble was not a felony-murder case. But in reviewing the sufficiency of indictments charging the crime of "arson," some of which made reference to fires in storebuildings rather than dwellings, the evolution of the word "arson" as used in California Statutes was reviewed in detail. It was specifically held in this connection that the crime defined in § 448a was appropriately designated in the indictments as "arson."

[5]There was no evidence warranting a conviction under § 447a since the Mecca Bar was not a dwelling house or any "kitchen, shop, barn, stable or other outhouse that is a parcel thereof, or belonging to or adjoining thereto. . . ."

struction of the term "arson" as used in section 189 to include the crime defined in section 448a renders section 189 so vague and indefinite as to deprive appellants of due process of law.

The principle here invoked, as stated in Lanzetta v. New Jersey, 306 U. S. 451, 453, is that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." In United States v. Petrillo, 332 U. S. 1, 7, it was stated that "the Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished. . . ." It was there pointed out that this rule against vagueness is met where the statutory language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

Any vagueness which may have inhered in the penal statutes here in question at the time of their enactment was cured by the 1947 opinion of the California Supreme Court in Ex parte Bramble, supra.[6] This being true, we need not decide whether prior to that decision section 189 was void for vagueness as applied to persons accused of murder resulting from the setting of a fire.[7]

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[6] See Winters v. New York, 333 U. S. 507, 510; Chaplinsky v. New Hampshire, 315 U. S. 568, 573; Fox v. Washington, 236 U. S. 273, 277.

[7] It may be noted that the rule against vagueness is most stringently applied when the state penal statute in question is intertwined with limitations on free expression. See Winters v. New York, supra. There is no such factor in the instant case.

We conclude that California's construction of the Penal Code sections in question did not have the effect of depriving appellants of any federally protected right. The district court did not err in holding that this asserted ground for granting relief under the applications is without merit.

Another ground asserted in the applications of Chavez and Bates why relief should be granted relates to asserted improper statements made to the jury by the district attorney and the trial judge. Excerpts from the trial record setting out these statements were attached to the Chavez application as exhibits C and D. It was contended in the applications that the making of these statements, considered separately or in connection with other asserted procedural errors, deprived appellants of due process of law.[5]

In connection with the argument of this point before the district court, counsel for appellants urged the district judge to examine the record of the state court proceedings for the purpose of noting the context in which the statements of the district attorney and the trial judge were made and to inform himself as to the "climate" that was thereby created.[6]

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[5]The substance of the challenged statements and remarks is stated in the opinion in People v. Chavez, supra, at pages 792-793.

[6]On the order of the court appellee had filed returns to the applications in which it was recited that Chavez and Bates were imprisoned and sentenced pursuant to valid judgments and commitments. At the same time the state had lodged with the district court a seventeen volume transcript of the state trial proceedings consisting of the clerk's transcript containing 215 pages, the court reporter's transcript of the voir dire examination of the jurors comprising 695 pages, and the reporter's transcript of the re-

The district judge declined to examine the state court record or any part thereof. Nor was a hearing held for the purpose of receiving evidence pertaining to this or any other point raised in the applications. No such hearing had been requested. In passing on this and all other questions presented, the district judge relied exclusively upon the applications and attached papers and the returns thereto, the opinion of the Supreme Court of California in People v. Chavez, and the oral argument of counsel for appellants and appellee.

Appellants argue here that the district judge erred in not examining relevant portions of the state trial record prior to ruling on the question of whether the assertedly improper remarks of the prosecution and the trial court had deprived appellants of due process of law.

Where an application by a state prisoner and the return thereto raise an issue of fact which if resolved in favor of the applicant would entitle him to relief, it is ordinarily necessary for the district judge to adjudicate the fact issue on the basis of evidence received by him in a hearing called for that purpose. In Brown v. Allen, 344 U. S. 443, 463-465, 506-507, however, it was held that the district judge may rely upon the state court adjudication of such fact issue if he examines the state trial record and satisfies himself that there is no "vital flaw" in the process of as-

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mainder of the trial consisting of 2,912 pages. The exhibits which were received at the trial and the tape recording to which reference will be made below were not lodged with the court.

certaining such facts in the trial court. In United States ex rel. Jennings v. Ragen, 358 U. S. 276, it was specifically held that reliance upon a state court adjudication of a fact issue may not be predicated upon an examination of the opinion of the state supreme court, but requires that the state court record be reviewed.[19]

Appellee contends, however, that the question pertaining to the assertedly improper remarks of the prosecution and the state trial judge presented no fact issue concerning which the district judge was required to either hold a hearing or rely on a state court adjudication. If this contention is correct, there was no occasion for the district judge to examine the state court record with regard to this particular point, and the failure to do so was not error.

Appellants do not question the statement in the opinion of the California Supreme Court in People v. Chavez, supra, at page 793, that no objection was taken to the challenged remarks of the trial judge or to some of the questioned argument by the prosecution. As to these remarks and argument, it was held in People v. Chavez that failure to voice an objection in the trial court precluded the point from being raised on appeal.

State remedies will not be deemed to have been exhausted within the meaning of 28 U.S.C.A. § 2254 if the failure to obtain a final state adjudication was due to inexcusable nonconformity with state procedural

[19] See, also, Rogers v. Richmond, 357 U. S. 220; Townsend v. Sain, 359 U. S. 64.

requisites.[11] No reason was offered in the district court or in this court as to why appellants should be excused for their failure to make timely objection in the state trial court to the questioned remarks of the prosecution and trial judge.

It follows that as to the criticized remarks concerning which no objection was made in the trial court, relief by federal habeas corpus is unavailable. Hence, as to such remarks no factual issue was presented and the district court was required to deny relief as a matter of law. Accordingly, the failure of the district court to examine the state record with reference to these remarks was not error.

With regard to some of the questioned remarks of the prosecution, defense counsel did make timely objections at the trial and requested that the prosecuting attorney be cited for misconduct.[12] The California Supreme Court held in People v. Chavez that the request to cite the prosecuting attorney for misconduct in making this statement was properly refused, since "the remarks were not evidence 'but purely a matter of argument.'"

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[11]Brown v. Allen, supra, at page 487; Application of Hodge, 9 Cir., 262 F.2d 778, 782; Daugharty v. Gladden, 9 Cir., 257 F.2d 750, 756.

[12]The remarks to which reference is now being made were uttered during the prosecution's argument to the jury. In commenting on testimony to the effect that one of the people's witnesses had stated she hoped the guilty persons would get the gas chamber the prosecutor said: "I wish I had a dollar for every person in this community that did not know anyone that died there, did not even know where the place was; that when they saw it in the paper, made the same utterance that those who did it should die."

The disposition which the California Supreme Court made of this point indicates that the only objection taken to the remarks in question was that they contained recitals of fact which were not supported by evidence in the case. This is borne out by an examination of the briefs which were filed in the California Supreme Court in connection with People v. Chavez.[13]

The conclusion of the state court that this prosecution argument did not necessitate reversal required no adjudication of fact but only a conclusion of law based upon an examination of the remarks in question. If the correctness of that conclusion may be reviewed in this habeas corpus proceeding, which we doubt, it is still true that no adjudication of fact is necessary in passing upon the question. It follows that there was no occasion for the district judge to examine the state court record with regard to this particular point, and the failure to do so was not error.

What is said above disposes of appellants' contention on this appeal that in dealing with the point raised in the applications concerning certain remarks made during the trial by the prosecution and the trial judge the district court was required to examine the state court record. Apart from the matter of examin-

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[13]Following the oral argument in this court we called for the briefs which appellants and appellee had filed in People v. Chavez. In complying with this request appellants called attention to the fact that these briefs were not before the district court. We are nevertheless entitled to take judicial notice of the state appellate proceedings, and we called for the state briefs so that this might be done. In any event the same information is to be found in the state trial record which is before this court as part of the record on appeal.

ing the state court record, however, there is appellants' further contention that the district court erred in rejecting as a ground for relief the point regarding such remarks.

Concerning all of the questioned remarks of the trial judge and some of those of the prosecution, it has already been pointed out that appellants inexcusably failed to preserve the point for adjudication by the California Supreme Court, and so may not raise it here. As far as these remarks are concerned, therefore, the district judge could not have granted relief in these habeas corpus proceedings and did not err in declining to do so.

This leaves for consideration only those remarks of the prosecution which are quoted in footnote 12. As before noted, the only objection taken thereto at the trial was that in making them the prosecution went outside the record. The California Supreme Court held otherwise, stating in effect that the remarks did not purport to recite facts but were purely a matter of argument.

It is questionable whether this state court determination is subject to review in this habeas corpus proceeding, but, assuming that it is subject to review as a prelude to determining whether any resulting prejudice could have deprived appellants of due process, we are convinced that the state court determination is correct. Members of the jury could not reasonably have understood that in making the questioned remarks the prosecuting attorney was undertaking to testify as to the facts or to represent that

there was evidence in the record supporting his reference to community sentiment.

But even if such remarks could have been interpreted, or assuming that the impropriety of the remarks in any other respect had been raised and should have been sustained, no prejudice resulted which has constitutional significance. It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and the federal court interference is warranted. Lisenba v. California, 314 U. S. 219, 236.[14] In our opinion the remark of the prosecution quoted in footnote 12 did not result in a denial of fundamental fairness essential to the concept of justice.[15]

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[14]The same test was applied in Crooker v. California, 357 U. S. 433, 439; and Lyons v. Oklahoma, 322 U. S. 596, 605. In Cicenia v. Lagay, 357 U. S. 504, 509, and Payne v. Arkansas, 356 U. S. 560, 567, the test applied was "whether a conviction was attended by fundamental unfairness." In Snyder v. Massachusetts, 291 U. S. 97, 105, followed in Rochin v. California, 342 U. S. 165, 169, Mr. Justice Cardozo said that what the Fourteenth Amendment protects are those principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." In Palko v. Connecticut, 302 U. S. 319, 325, also followed in Rochin, supra, Mr. Justice Cardozo referred to immunities "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, [have] become valid as against the states." In Malinski v. New York, 324 U. S. 401, 417 (concurring opinion), the test was said to be whether the state proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ." In Betts v. Brady, 316 U. S. 455, 462, the test applied was whether the criticized act or ruling during the state criminal trial constitutes "a denial of fundamental fairness, shocking to the universal sense of justice. . . ."

[15]Depending upon the nature of an asserted trial court error, it may or may not be necessary to examine part or all of the trial proceedings in determining the extent of prejudice resulting from such error. Here an examination of the record is not necessary

A third ground asserted in the applications of Chavez and Bates why relief should be granted has to do with the fact that a police officer was permitted over objection to read as evidence two statements transcribed from tape recordings of conversations between police officers and Hernandez and between police officers and one Oscar Brenhaug. Excerpts from these statements were attached as exhibits A and B to the application of Chavez.

Appellants argue that the district judge erred in not examining the trial record for the purpose of ascertaining the context in which they were read to the jury and the "climate" or prejudice which resulted. They also contend that apart from the asserted error in this regard the district court erred in holding that the reading of these statements to the jury did not entitle appellants to relief in these habeas corpus proceedings.

The Hernandez statement was received solely as to him, and the jury was instructed that it should not be used in any way as to Chavez or Bates. Appellants allege, however, that the statement was so prejudicial

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since the asserted error consists of a single incident, and the challenged remarks constituting that incident are set out verbatim as an exhibit attached to the applications. A review of other parts of the trial record would not in our opinion be helpful in measuring the prejudice, if any, resulting from the incident.

It may be noted that the rule of Brown v. Allen, supra, at pages 506-507, relating to the examination of trial records under certain circumstances, refers to the adjudication of "basic" or "historical" facts which, as there explained, mean the recital of external events and the credibility of their narrators. That rule has no application when the inquiry has to do with the extent of prejudice flowing from a trial court error. What is called for in such an inquiry is an exercise of judgment and a conclusion of law, not a finding of fact.

as to them that if should not have been received despite its relevance as to Hernández. The California Supreme Court, presented with the same question, held that the statement was admissible in view of its relevance as to Hernandez and the instruction given by the trial court.

Where there is no question concerning a federally significant external event such as the voluntariness of a confession or the knowing use of perjured testimony, trial court rulings on the admissibility of evidence may not be questioned in a federal habeas corpus proceeding. See Eberhart v. United States, 9 Cir., 262 F.2d 421. The fact that certain evidence is prejudicial is immaterial if in fact it was admissible. No federal question of fact or law was raised as to the reading of Hernandez' statement.

It follows that there was no occasion for the district judge to determine the extent of prejudice resulting from the reading of the Hernandez statement by examining the state record or otherwise. It likewise follows that the district court did not err in holding in effect that the question concerning the admissibility of this evidence, as discussed above, was not available to appellants in this habeas corpus proceeding.

The Brenhaug statement consisted of accusatory statements in response to questions put to him by the police in the presence of Chavez, Bates and Hernandez, together with the latters' reactions when asked what they had to say concerning Brenhaug's statement. The Brenhaug statement was received as to Hernandez and Bates, but not as to Chavez, and the

jury was so instructed. Chavez alleges, however, that the statement was so prejudicial as to him that it should not have been received whether or not admissible as to Hernandez or Bates.

The California Supreme Court held that the statement was properly admitted as to Hernandez and that as to Chavez a proper cautionary instruction had been given. It follows that as to Chavez the reading of the Brenhaug statement presents no federal question of fact or law. Accordingly, as to him we reach the same conclusion as stated above with respect to the Hernandez statement.

With regard to Bates, however, the California Supreme Court held that it was error to read part of the Brenhaug statement. The reasoning behind this conclusion is set out in the opinion of that court on page 791, and need not be repeated here. The California Supreme Court further held, however, that error in this regard did not require reversal. That court stated in its opinion that Brenhaug testified to the same effect at the trial and was subjected to lengthy cross-examination. This and other evidence properly received, that court held, amply established the case against Bates. Moreover, the California Supreme Court stated, Bates' position at the trial was not based on a denial of what happened on the night of the fire, but on the contention, rejected by the jury, that he was then so intoxicated that he must be deemed guiltless of the crime.

This reasoning by the California Supreme Court did not involve any adjudication of fact concerning an ex-

ternal event. Nor do appellants here question any of the fact recitals in the state court's opinions. The determination by the California Supreme Court that the trial court error was not prejudicial is a conclusion of law and not an adjudication of fact. See footnote 15.

We conclude that as to Bates the reading of the Brenhaug statement presents no issue of fact within the meaning of the Brown v. Allen rule.[16]

A question of law is presented as to whether the trial court error was so prejudicial as to deprive Bates of due process of law. As to this the federal district court was not bound by the state court conclusion that the error was not prejudicial.

As before noted, the factual basis relied upon by the state supreme court in holding that the error as to Bates in permitting the Brenhaug statement to be read was not prejudicial has not been questioned by appellants. Adverting to the same factual basis, it is our view that the reading of that statement, which was error in so far as Bates is concerned, was not so prejudicial as to constitute a denial of fundamental fairness essential to the concept of justice. See Lisenba v. California, supra, and footnote 14.

Finally, with regard to the reading of the Hernandez and Brenhaug statements it is alleged that the transcribed statements were not accurate representa-

[16] In all that is said above regarding the presence of an issue of fact concerning the reading of the Hernandez and Brenhaug statements, we intend to reserve for separate discussion below the question as to the accuracy of the transcribed statements.

tions of the recorded conversations. Amplifying this allegation, counsel for Chavez told the district judge at the oral argument on these applications that the trial judge provided an opportunity for counsel to hear the tape recording from which the statements were transcribed. This was done before the statements were received in evidence. The trial judge did not himself listen to the recording.

Further amplifying this allegation, the district judge was told that when the statements were sought to be read to the jury, counsel for appellants represented to the trial judge that the transcriptions were not in accord with the tape recordings. The trial court was told that there were many places where the recordings were completely unintelligible and that there were glaring disparities between the recordings and the transcriptions. The state trial judge, according to appellants' representations to the district judge, nevertheless declined to listen to the recordings. The state judge permitted the transcribed statements to be read to the jury on the police officer's testimony that in so far as his information was concerned the statements were substantially correct.

The district judge was urged to call for the recordings and listen to them himself for the purpose of ascertaining the accuracy of the transcriptions and the extent of any prejudice arising from the use of inaccurate transcriptions. The judge declined to do so, holding in effect that he was entitled to rely upon the state trial court's acceptance of the police officer's testimony that the statements were substantially correct.

As stated earlier in this opinion, state court rulings on the admissibility of evidence are not subject to review in federal habeas corpus proceedings where no question is presented concerning a federally significant external event. Here, however, the trial court ruling that the transcribed statements were admissible required that court to adjudicate the facts concerning an external event: the accuracy of the transcriptions. This external event has federal significance if the transcriptions were grossly inaccurate, to the substantial prejudice of appellants. In that event there would, in our opinion, be a denial of that fundamental fairness in the trial proceedings to which appellants were entitled under the Due Process Clause.

It follows that with respect to the contention that the transcribed statements were grossly inaccurate an issue of fact is raised which, if resolved in favor of appellants, would entitle them to relief. Concerning that issue of fact the district judge was required to make an adjudication of his own following a hearing at which evidence could be presented unless, under the circumstances outlined in Brown v. Allen, he chose to rely upon the state court adjudication of that fact. He followed neither course. As indicated in the Jennings, Rogers and Townsend cases, supra, it is therefore necessary to vacate the judgment and remand the case to the district court for further proceedings.

At such further hearing the tape recordings should be called for and listened to, and the trial court proceedings relative to the use of the transcribed statements should also be examined. The fact that parts of

the recordings may be unintelligible and were therefore not included in the transcribed statement would not constitute a denial of due process unless it is apparent that substantial prejudice resulted therefrom. But a material variance between intelligible portions of the recordings and the transcribed statements substantially prejudicing appellants would require federal relief, provided that the point was properly raised and preserved at the trial.

The final ground asserted in the applications of Chavez and Bates why relief should be granted has to do with the introduction of certain photographs taken at the scene of the fire. Two of the photographs show the bodies of persons inside the premises. They were used in connection with the testimony of a fireman who was called as an arson expert to testify as to the point where the fire originated. The California Supreme Court held that their probative value outweighed the danger of prejudice to appellants and that the trial court accordingly did not abuse its discretion in permitting their introduction.

The other photographs showed the bodies of the victims after their removal from the premises. They were admitted to prove the degree of burns on certain bodies. Appellants, however, offered to stipulate to the cause of death and the identification of the victims. The California Supreme Court held that in view of this offered stipulation it was an abuse of discretion to overrule the objections to the latter photographs. That court held, however, that in view of the entire record, including the testimony as to the burned con-

dition of several bodies, the error did not result in a miscarriage of justice, citing California Constitution, art. VI, §4½.

As to the photographs taken at the premises, our discussion of the Hernandez statement is applicable. In view of the state court ruling that the probative value of the photographs outweighed the prejudice resulting from their introduction, no federal question of fact or law is presented. Hence, it was not incumbent upon the district court to call for and examine those photographs or to examine any part of the state court records. Nor did the district court err in holding that introduction of these photographs did not entitle appellants to relief in these habeas corpus proceedings.

With regard to the remaining photographs, the question presented in these habeas corpus proceedings is whether the erroneous introduction was so prejudicial as to deny appellants a fundamentally fair trial. In considering this issue no question of fact is presented in the sense used in Brown v. Allen, since the problem does not concern an event external to the trial or the credibility of narrators of such an event.

It is nevertheless true that appellants cannot adequately present the question of law as to the extent of prejudice unless the photographs are actually examined by the trial court. While it is not denied that they are gruesome and revolting, adjectives are a poor substitute for the visual evidence. Excerpts of the transcribed statements and challenged arguments and remarks could be attached as exhibits to the appli-

cations. This was not possible with regard to photographs received as exhibits at the state trial.

Since this cause is to be remanded for further proceedings in connection with the asserted inaccuracy of the transcribed statements, we think the district court should at the same time examine the photographs taken away from the premises as an aid in redetermining whether their introduction has deprived appellants of due process. The photographs will then be in the record of the habeas corpus proceedings in the event such proceedings again come before this court.[12]

While not required by the rule of Brown v. Allen, the district court may find it advisable at the same time to consult any specific part of the trial proceedings to which his attention may be called by the parties as having a bearing upon this question of prejudice. It is to be noted that the California Supreme Court found it desirable to examine the trial proceedings in this connection. While that court in discussing the point made reference to "the entire record", it took special note of certain testimony bearing upon the point. The district court is under no obligation to review the entire record in dealing with this question.

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

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[12]It may be noted that the California Supreme Court has recently reversed the imposition of a death penalty in a case in which gruesome photographs were improperly received. The court held, however, that this error did not have any bearing on the jury's determination that the defendant was guilty of murder in the first degree. See People v. Love, 53 A. C. 847, decided March 22, 1960.

Should the orders entered after further proceedings lead to new appeals, they may be heard upon the present record and briefs, appropriately supplemented.

(Endorsed) Opinion Filed June 16, 1960.

Frank H. Schmid, Clerk.

Appendix B

United States Court of Appeals
For the Ninth Circuit
No. 16,590

Manuel Joe Chavez, Appellant,

vs.

Fred R. Dickson, Warden, California State Prison, San Quentin, California, Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and hereby is reversed and that this cause be and hereby is remanded to the said District Court for further proceedings consistent with the opinion of this court. Should the order entered after further proceedings lead to new appeals, they may be heard upon the present record and briefs appropriately supplemented.

(Endorsed) Judgment
Filed and Entered: June 16, 1960
Frank H. Schmid, Clerk

United States Court of Appeals
For the Ninth Circuit

No. 16,622

Clyde Bates,
Appellant,

vs.

Fred R. Dickson, Warden, California State Prison, San Quentin, California,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and hereby is reversed and that this cause be and hereby is remanded to the said District Court for further proceedings consistent with the opinion of this court. Should the order entered after further proceedings lead to new appeals, they may be heard upon the present record and brief appropriately supplemented.

(Endorsed) Judgment
Filed and Entered: June 16, 1960
Frank H. Schmid, Clerk

Appendix C.

United States Court of Appeals
For the Ninth Circuit
No. 16,590

Manuel Joe Chavez, Appellant,

vs.

Fred R. Dickson, Warden, California State Prison, San Quentin, California, Appellee.

ORDER DENYING PETITION FOR REHEARING

Excerpt from Proceedings of Wednesday, August 17, 1960.

Before: Magruder, Hamley, and Koelsch, Circuit Judges.

On consideration thereof and by direction of the Court, it is ordered that the petition of appellee filed July 15, 1960, and within time allowed therefore by rule of court for rehearing of the above cause be and hereby is denied.

United States Court of Appeals
For the Ninth Circuit

No. 16,622

Clyde Bates, Appellant,

vs.

Fred R. Dickson, Warden, California State Prison, San Quentin, California, Appellee.

ORDER DENYING PETITION FOR REHEARING

Excerpt from Proceedings of Wednesday, August 17, 1960.

Before: Magruder, Hamley, and Koelsch, Circuit Judges.

On consideration thereof and by direction of the Court, it is ordered that the petition of appellee filed July 15, 1960, and within time allowed therefore by rule of court for rehearing of the above cause be and hereby is denied.

Appendix D

United States District Court for the Northern District of California, Southern Division

At a stated term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof in the City and County of San Francisco, on Friday the 7th day of August in the year of our Lord One Thousand Nine Hundred and Fifty-nine. Present the Honorable Louis E. Goodman.

Before Judge Louis E. Goodman, Case No. 38,423. in re Petition of Manuel Joe Chavez for Writ of Habeas Corpus and Order to Show Cause.

After hearing Richard Gladstein and Norman Leonard for petition and Arlo Smith for respondent State of California, ordered Petition for Writ of Habeas Corpus denied. Motion for Certificate of Probable Cause granted. Record of case lodged with the Court.

United States District Court for the Northern District of California, Southern Division

At a stated term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof in the City and County of San Francisco, on Friday the 7th day of August in the year of our Lord One Thousand Nine Hundred and Fifty-nine. Present the Honorable Louis E. Goodman.

Before Judge Louis E. Goodman, Case No. 38,427, in re Petition of Clyde Bates for Writ of Habeas Corpus and Order to Show Cause.

After hearing Ruth Jacobs for petition and Arlo Smith for respondent State of California, ordered Petition for Writ of Habeas Corpus denied. Motion for Certificate of Probably Cause granted. Record of case lodged in case No. 38,423.

Appendix E

28 USC §2241, 63 Stat. 105.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof,

the validity and effect of which depended upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

28 USC §2254, 62 Stat. 967.

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 532

R. DICKSON, Warden, California State Prison at San Quentin,

Petitioner,

vs.

JOSEPH JOE CHAVEZ and CLYDE BATES,

Respondents.

PETITION FOR A REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI.

STANLEY MOSK,

ARLO E. SMITH,

Attorneys for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 532

FRED R. DICKSON, Warden, California State Prison at San Quentin,
Petitioner,

vs.

MANUEL JOE CHAVEZ and CLYDE BATES,
Respondents.

PETITION FOR A REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI.

Fred R. Dickson, petitioner, prays that this Court grant a rehearing of its order of January 9, 1961, denying petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case as prayed for in the petition filed November 15th. 1960, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

I

THE OPINION OF THE COURT OF APPEALS IN THE PRESENT CASE IS IN DIRECT CONFLICT WITH THE SUBSEQUENT DECISION BY THIS COURT IN ROGERS v. RICHMOND, FILED MARCH 20, 1961.

The Court of Appeals has reversed the District Court and required the District Court to take evidence for the purpose of adjudicating the accuracy of transcribed statements introduced at the murder trial of respondents.

Such adjudication was ordered in the absence of any allegation in the petition for writ of habeas corpus of a "vital flaw" in the determination of the question by the State Court. Such readjudication was ordered in the absence of a claim that the undisputed testimony in the State record establishes the inaccuracy of the transcription. Such readjudication was ordered in the face of a waiver of these questions by the respondents' failure to present a proper objection in the trial Court and by their failure to present evidence to counter the undisputed evidence presented in the State Court as to the accuracy of the transcript.

The Court of Appeals also ordered the District Court to examine photographs introduced in the State murder trial for the purpose of determining whether or not appellants were prejudiced. This determination was ordered with the instruction by the Court of Appeals that "the District Court is under no obligation to review the entire record in dealing with this question".

These rulings of the Court of Appeals are in direct conflict with the decision of this Court in the case of *Rogers v. Richmond*, decided March 20, 1961. This Court found a "vital flaw"—the use of an improper standard in testing the admissibility of a confession—which affected the reliability of the state findings of fact. Nevertheless this Court did not remand the case to the Federal Court for determination of the factual basis of the constitutional contention but remanded it to the State Court. The decision of the Court of Appeals in the present matter is in direct conflict with the *Rogers* decision. In the present case no *vital flaw* was alleged by the petition for writ of habeas corpus, there was no allegation that the undisputed testimony established the constitutional defect and there was a waiver of this question, nevertheless the Court of Appeals has ordered a redetermination of this question of fact.

Petitioner would concede that if a vital flaw is alleged and found to exist the case should be remanded to the District Court for redetermination of the factual question which is the basis of the constitutional contention; if respondents had alleged that the undisputed or uncontradicted testimony established a discrepancy in the transcriptions of constitutional significance, then the District Court must review the record (assuming no waiver of the question by failure to properly present it in the State Court). In spite of these circumstances the Court of Appeals has ordered a redetermination of the factual question. Such order is contrary to the decision of this Court in the case of

Rogers v. Richmond. It is likewise contrary to the decisions of the Court of Appeals and the District Court and the *Rogers* case, which were decided upon different grounds than the opinion of this Court.

The concern for the pre-emption of "functions that belong to state machinery in the administration of state criminal law" which this Court showed in the *Rogers* decision would certainly require a reversal of the decision of the Court of Appeals in the present case.

That portion of the opinion of the Court of Appeals which ordered the District Court to examine the photographs introduced at the murder trial to redetermine whether their introduction deprived defendants of due process is in direct conflict with the decision of this Court in the *Rogers* case. The Court of Appeals stated that the District Court is under no obligation to review the entire record in deciding this question. Petitioner has consistently contended that if this question is to be redetermined by the District Court it must be done only upon an examination of the entire record, including the evidence. The Court of Appeals would permit the District Court to decide the question of prejudice without examining the entire cause. This would seem to be "unfair" in a constitutional sense. Both parties are entitled to an evaluation of the prejudicial effect of anything occurring at the trial to be judged in the context of the entire cause, including the evidence. This Court in the *Rogers* case in referring to the determination of the voluntariness of a confession stated that this should not be established

in "abstraction from the whole living complex of a criminal trial . . ."

II

THE CONFLICT WHICH EXISTS BETWEEN THIS COURT'S DECISION IN ROGERS v. RICHMOND AND THE NUMEROUS OTHER CASES SUCH AS THE INSTANT CASE HAVE LEFT THE DISTRICT COURTS WITH A BEWILDERING SET OF ALTERNATIVES TO CHOOSE FROM IN DETERMINING THE PROCEDURE TO BE FOLLOWED IN HABEAS CORPUS CASES.

Innumerable conflicts exist between the opinions of the various Circuit Courts and the opinion of this Court in the case of *Rogers v. Richmond*. This Court has not rendered a full opinion on the question of the powers, duties and discretion of the District Court with reference to the taking of evidence on a factual question which is the basis of a federal question since the opinion in *Brown v. Allen* in 1952. The Court in the decision in *Rogers v. Richmond*, although granting the writ because of issues concerning appropriate procedure for dealing with petitions for writs of habeas corpus, disposed of the case on other issues. The procedural result of the *Rogers* decision has, however, left further areas of doubt as to the appropriate procedure for the District Courts and counsel to resolve. The other recent decisions of this Court have been *per curiam* decisions and have been no real guidance to the District Courts or to counsel in disposing of the some 800 petitions for writs of habeas corpus filed in the District Courts each year. There are no standards provided for the District Court in the de-

termination of these questions in death penalty cases which are as frequently as not presented on the eve of a scheduled execution. The conflict between the decisions leaves the various District Courts in confusion. This problem should be authoritatively determined by this Court and not left in conflict and doubt.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that a rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
April 25, 1961.

Respectfully submitted,

STANLEY MOSK,
Attorney General of the State of California.

ARLO E. SMITH,
Deputy Attorney General of the State of California.

Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

Dated, San Francisco, California,
April 21, 1961.

ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorney for Petitioner.